Supreme Court, U.S.
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No. 99-206

IN THE

Supreme Court of the United States

PAUL WIMMER,

Petitioner,

v.

SUFFOLK COUNTY POLICE DEPARTMENT
and JOHN GALLAGHER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. Proceedings Below

Petitioner, Paul Wimmer (hereinafter referred to as "Petitioner"), was employed on March 29, 1993 as a police officer by respondents, Suffolk County Police Department (hereinafter referred to as "SCPD") and Peter F. Cosgrove, Commissioner of the Suffolk County Police Department (hereinafter referred to as "Commissioner Cosgrove"). Upon his appointment, Petitioner began serving an eighteen (18) month term as a probationary police officer. Commissioner Cosgrove terminated Petitioner on February 15, 1994 as a result of unsatisfactory performance during his probationary period (900)[1]. Petitioner, a white male, commenced this action seeking damages for civil rights violations in connection with the termination of his employment by the filing of a summons and complaint on or about November 21, 1994.

The SCPD and Commissioner Cosgrove were the only defendants named in the complaint. At trial, the SCPD was dismissed as a party and the district court allowed Petitioner to amend his complaint to add the County of Suffolk (hereinafter referred to as the "County") as a defendant (617).

Commissioner Cosgrove was only named in the caption of the complaint. The complaint did not otherwise mention Commissioner Cosgrove and did not contain a single allegation against him.

The complaint contained three federal claims: (i) a Title VII claim (Complaint, ¶¶37 and 38 at pp. 7-8); (ii) First Amendment and Fourteenth Amendment claims (Complaint, ¶¶40 and 41 at pp. 8-9); and (iii) a 42 U.S.C. § 1983 claim

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1. Numerical references are to pages in the Joint Appendix filed with the Second Circuit Court of Appeals.

(Complaint, ¶¶43 and 44 at p.9). The complaint also alleged causes of action under the New York Executive Law (Complaint, ¶38 at p. 8) and New York Constitution (Complaint, ¶41 at pp. 8-9).

After he was terminated by Commissioner Cosgrove, Petitioner applied to be reinstated by his previous employer, the New York City Police Department (hereinafter referred to as the "NYPD") (328). As part of the application process, Petitioner prepared a statement explaining his termination from the SCPD (1129). This statement was not disclosed by Petitioner to the defense prior to trial. It was obtained by the defense on the eve of trial only after a so-ordered subpoena was served on the NYPD.

At trial Petitioner claimed that he did not recall the statement (334). He remembered it when he was confronted with it (334). In the statement, dated March 3, 1994, Petitioner told the NYPD, "[b]asically, [I] was terminated from [the SCPD] for personality difference with two field training officers out of a total of five or six" (1129). Clearly, when he was seeking to be reinstated by the NYPD, Petitioner did not claim that Commissioner Cosgrove or the County violated his civil rights.

By notice of motion dated November 25, 1996, the SCPD and Commissioner Cosgrove moved for summary judgment on the grounds that: (i) Petitioner was not engaged in protected activity under Title VII; (ii) there could be no direct action against a municipality under the First Amendment; (iii) the complaint did not plead that the alleged unlawful termination was pursuant to an official policy or custom of the County; and (iv) the state law claims were barred by the failure to serve a notice of claim. Petitioner opposed the motion for summary judgment. The district court refused to consider and decide the motion for summary judgment.

The case was tried before a jury. At the close of Petitioner's case, the district court granted a Fed. R. Civ. P. 50 motion by the County and Commissioner Cosgrove to dismiss the Title VII claim, the claim brought directly under the First Amendment and the state human rights claim. The district court reserved decision on the motion to dismiss the 42 U.S.C. § 1983 claim. At the close of the defense case, the Rule 50 motion to dismiss the 42 U.S.C. § 1983 claim was renewed and was granted by the district court. The Second Circuit Court of Appeals affirmed.

B. Statement of Facts

Petitioner came to the SCPD after what he alleged in his complaint and described in his direct testimony as "3 successful years with the New York City Police Department ("NYPD") and New York City Housing Authority Police Department ("HAPD")" (Complaint ¶9, at p.3). On cross-examination, Petitioner was confronted with evidence that he had failed to divulge during pre-trial discovery which demonstrated that he lied about his so-called "career" as a police officer before coming to the SCPD. Petitioner initially denied, then he was forced to acknowledge, that he was held over in the New York City Police Academy and was assigned to the Police Applicant Recruit Training Section for ten months for a psychological evaluation, commonly known as a "psych hold" (369-370).

While he was on "psych hold", Petitioner was engaged in activities like modeling uniforms and escorting the commanding officer of the Police Academy to ceremonial functions (177-179). After spending fifteen (15) months of his three (3) year New York City police career in the NYPD Academy (October 15, 1990-January 23, 1992) (172; 183; 1120), Petitioner finally entered a HAPD field training unit known as PBMTU(T). While he was in training, Petitioner received a critical evaluation in the area of "Human Relations" (1126):

> Officer is often to (sic) eager to assimilate with others in the squad. His actions have a tendency to make his peers uncomfortable and this alienates him from others. The afore-mentioned items have been discussed with the officer in an attempt to correct the situation.

Petitioner was assigned to a HAPD precinct on July 13, 1992 after he finished his field training (1120). After just two months at his first precinct assignment, Petitioner was attacked and injured by a young woman while he was giving her a parking ticket (193-194). Petitioner laterally transferred to the NYPD on November 30, 1992, which was slightly more than four months after he began his first precinct assignment in the HAPD (1120). He spent four (4) months in the NYPD, including at least three (3) weeks back in the NYPD Academy (196-197), before he was appointed to the SCPD on March 29, 1993.

Petitioner failed his initial psychological exam with the SCPD (371). He graduated from the SCPD Academy with a grade of 77.34 out of a minimum passing grade of 75. One of Petitioner's field training officers (FTOs) in the SCPD, P.O. Glenn M. Ferrante, who rode with Petitioner in a patrol car on eighteen tours, reported to his precinct commander on February 6, 1994, that "[t]he undersigned officer's overall evaluation of PPO Petitioner is that his ability to perform as a Police Officer is unacceptable. I believe he is an immature individual and possibly has some sort of psychological imbalance" (889). Ferrante concluded that Petitioner was "unable to properly perform the duties of a Police Officer. I strongly feel he would be a danger to himself and the public" (890; 1014; 1033). Another one of Petitioner's field training officers, P. O. James P. Gormley, reported on January 27, 1994 that:

> [Petitioner's] comments to me were sometimes bizarre, if not offending. At one point during training

> he stated that he was having an orgasm, ever since he was 5 years old he dreamed of driving a police car on the LIE [Long Island Expressway]. [Petitioner] seems to be more interested in making "contacts" in the Department than learning how to be a Suffolk County Police Officer. He was very negative towards any feedback that I gave him.

(887). Gormley also reported on October 24, 1993 that Petitioner made remarks, like "we both wear blue, and he [Petitioner] shits and pisses blue" (991; 675). Another FTO, P.O. George Hodge, reported on October 7, 1993 that Petitioner verbalized "a paramount desire to achieve higher rank", and "as this idiosyncrasy could very well alienate neighboring sector car operators I feel it is significant" (973). Hodge could not have had any knowledge of Petitioner's remarkably similar performance evaluations while he was trained at the HAPD; Petitioner withheld those evaluations from the defense.

Upon entering the SCPD Academy, Petitioner was required to submit a "Self Introduction" (849-849a). Petitioner began his self-introduction by describing his career expectation. Petitioner wrote that he wanted to become a "Detective Lietenant (sic), commanding officer of the Homicide Squad, perhaps making CAPTAIN" (849). Petitioner summed up his expectations at the end of his self introduction. He wrote that "[m]y lifetime goal is to be the Finest of the Finest in Suffolk County, P.D., and to serve after my retirement as a legislator, and a judge therefore a lifetime achievement of "excelling" in All *three branches* of government: Executive, Legislative and Judicial. I believe I have the gift of virtue" (849a). Petitioner acknowledged on cross-examination that he pursued admission into law school, but was not accepted (204). In between the description of his career goals, Petitioner described his father as "an irrational alcoholic" and "a sad example of civility" (849a). Petitioner then described himself as "an ethicist, a lover

of wisdom and justice" (849a). He wrote that "I have recently been nominated Vice President of Humanity Against Hatred" (849a). He wrote that "[m]y legal mentor is Thurgood Marshall, and my local hero is the Honorable Judge (retired) Stuart Namm for his courage to speak out on the injustices and collusion between the local police and prosecutors. I am a white male who respects and Admires All people" (849a).

On direct examination, Petitioner described what he claimed was harassment of him at the SCPD Academy. He referred to six exhibits which were internal correspondence he prepared at the direction of his instructors. Petitioner was directed to write about the meaning of the word semantics (851); about "ten codes" (852-853); about not having a uniform shirt tucked in (854); about a memobook error (855); about an improper shoe shine (858) and about submitting an arrogantly worded appeal of an examination question (873-878).

On cross-examination, Petitioner acknowledged nineteen (19) other internal correspondence that he was required to write at the police academy (850; 856-872; 875-876; 879-880; 1132-1133). They addressed deficiencies far more substantive than the untucked shirt and unshined shoes Petitioner chose to talk about on direct examination. The internal correspondence addressed Petitioner's deficiencies in understanding topics like the definition of serious physical injury (856); when a police officer can enter a home to make an arrest (866); the elements of burglary in the second degree (869-872; 879) and improper handcuffing technique (880).

According to Petitioner, he did not think he did anything wrong when he was required to write many of the internal correspondence at the police academy (223). Petitioner believed that the instructors were trying to make him resign (223). On cross-examination, Petitioner admitted that he only testified on direct examination about the two high test scores he received at the academy (225-226). Petitioner acknowledged that he also

received poor test scores and that he graduated close to the bottom of his academy class with a final grade of 77.34, which was 2.34 points away from failing out of the police academy (225-227).

After barely graduating from the police academy, Petitioner began field training. Petitioner was trained for eighteen (18) weeks at two precincts — the Fifth Precinct and the Sixth Precinct. He was trained by eleven police officers who served as Field Training Officers (FTOs) and drove in a patrol car with Petitioner. Those FTOs were Police Officers Pitts (949-966); Roche (967-968; 974-978; 978-983); Hodge (972-973); Ryan (976-977); Gormley (984-991); Ferrante (997-1000; 1003-1010; 1013-1016; 1020-1035; 1038-1041; 1042-1044); Hatton (1001-1002); Tucker (1011-1012); Fountain (1036-1037); Nolan (1045-1048; 1051-1060; 1063-1068; 1072-1099) and Brierton (1049-1050; 1061-1062). Phases I (3 weeks) and II (3 weeks) of Petitioner's field training at the Fifth Precinct were evaluated in end of phase reports prepared by one sergeant, Terrence Brady (969-971; 992-996; 886; 902; 701-708). Brady was the only sergeant who evaluated Petitioner's field training. Phase II was also evaluated in writing by Lt. William Murphy (901; 589-590). Phases III (3 weeks) and IV (3 weeks) of Petitioner's field training at the Sixth Precinct were evaluated in end of phase reports prepared by Lt. Joseph Williams (1017-1019; 1042-1044).

Petitioner's field training during Phases I, II, III and IV was also evaluated by the SCPD Deputy Chief of Patrol, Russell Brown, by the Sixth Precinct's Commanding Officer, Inspector Philip Robilotto, by Deputy Inspector Robert Gould of the Sixth Precinct and by Captain James Rhoads from the Chief of Patrol's Office (893). Petitioner was categorized at the "minimum acceptable" level for Phases I and II (892). After rounding off grades in 17 of 32 categories in Phase III to the next highest number, Petitioner was again placed in the "minimum

acceptable" category (893). At the end of Phase IV, Petitioner was unacceptable in the majority of categories (893). Other criticisms of Petitioner included his obsession with making rank; his inability to accept criticism and feedback; an unacceptable attitude towards the public; his tendency to become argumentative with his field training officers; he was overly talkative about inappropriate items and his inability to handle paperwork involved with the job (892-893). Based on the foregoing, it was decided to extend Petitioner's field training by two (2) complete phases (6 more weeks) and to send him for two (2) days of intensive remedial training at the Police Academy (893; 881-882; 903-904).

On cross-examination, Chief Brown explained why Petitioner's field training was extended (824-825):

> It was decided that we were going to give him two extra phases of training. This was to give him the best opportunity to get the most out of our training to be a police officer.
>
> We were trying to salvage the officer, and it was my determination that we would do extra field training to that goal.

Phase V of Petitioner's extended field training was evaluated in an end of phase report prepared by Lt. Joseph Williams (1069-1071). Phase VI was evaluated in an end of phase report prepared by Lt. William Murphy (1100-1102).

During Phases V and VI, Petitioner was criticized for unacceptable paperwork, for over-talkativeness and inappropriate remarks and for derogatory comments about civilians, fellow officers and supervisors (894; 908-909). In the daily observation report for December 21, 1993, P.O. Brierton commented that Petitioner had apparently witnessed a motor

vehicle accident occur, and Petitioner "was going to disregard actions of one vehicle, which was apparently over a double, solid yellow line because operator stated she knew Lt. Jantzen" (1062). In the daily observation report for December 24, 1993, P.O. Nolan wrote that Petitioner "failed to find a potential weapon (sm. survival type pocket knife) on DWI prisoner during initial search after cuffing" and that Petitioner "also failed to stay w/susp./prisoner at MVA after being told to do so by" P.O. Nolan (1068). Both of those daily observation reports were noted by Captain Rhoads in his summary of Petitioner's field training dated January 24, 1994 which recommended to Rhoads' superior, Chief Brown, that Petitioner be terminated (905-910). In a second report dated February 4, 1994 to Chief Brown, Rhoads noted that at the conclusion of six (6) phases (18 weeks) of field training, including two (2) days of special remedial training at the police academy, it was decided that Petitioner's field training would end because "nothing would be gained by continuing his field training" (894).

Petitioner testified that he met with Captain Rhoads at the end of Phase VI (140-145). Petitioner did not testify that he told Rhoads that he was being retaliated against by other police officers. Similarly, Petitioner did not complain to Captain Rhoads about any racial slurs or the targeting of Hispanic motorists.

On January 24, 1994, another meeting was held to discuss Petitioner's future with the SCPD. This meeting was called by Chief Brown (835) and was attended by Brown, Captains Rhoads and Gabriel, Lieutenants Murphy and Williams, Sergeant Brady and P.O.'s Friedrich, Ferrante, Gormley, Hodge and Pitts (836, 894). Brown testified on cross-examination that the attendees were determined based on who was working on the day of the meeting (836). Brown explained the purpose of the meeting (836-837): "I wanted to talk to the officers and supervisors who were directly involved in [Petitioner's] field

training to see what level we had gotten to, whether there were any additional steps that we could take to salvage this officer." Captain Rhoads summarized the meeting in his memorandum of February 4, 1994 (894):

> At the conclusion of the meeting, a unanimous agreement was reached that PPO Wimmer's performance could not be brought up to an acceptable level and the potential for this officer to expose the department to complaints, and possible lawsuits, presented an unacceptable risk. Therefore, he should not be put on the street. It was also agreed that a recommendation for termination should be sent to the Commissioner.

On direct examination, Chief Brown summarized his knowledge of Petitioner's training and performance (794-795):

> He was having the same problems, he was having problems dealing with the public, he was almost contemptuous about the public, he was cynical about them.
>
> He was having problems dealing with his field training officers, he wasn't doing what they were telling him to do. He would become argumentative with them every time they tried to give him some constructive criticism and generally not take any direction from them.
>
> He was also deficient in certain things that we wanted him to do. He was not able to properly prepare his field reports or some of the other general reports that we do on a daily basis. He was having some problems with officer safety.

> He was also having problems with talking too much to the public. He would get out, he would be saying things to the public that had no bearing on the incident at hand and in some instances people found offensive.

Brown decided that Petitioner was not suited to be a SCPD police officer and decided to recommend to Commissioner Cosgrove that Petitioner be terminated (796; 813). Brown was asked to explain the reasons for his decision and gave this answer (796):

> Again, he was having problems with the public, he wasn't responding to training and he wasn't getting along with his field training officers and in fact he wasn't getting along with a lot of the officers.

Brown's recommendation to terminate Petitioner was sent up through the chain of command to Commissioner Cosgrove. In a memorandum to his superior, Chief of Patrol Edwin Michel, Brown attached a report prepared by Captain Rhoads which summarized Petitioner's professional deficiencies and the significant unsuccessful attempts to correct those deficiencies (891-894). Brown wrote (891):

> Although there are no single deficiencies or incidents of significant magnitude sufficient to warrant his dismissal, collectively, there are overwhelming deficiencies and character flaws which preclude the probability that he will ever become a well-adjusted and productive police officer. This conclusion was reached after attending roundtable discussion with numerous people who were involved in this officer's field training and reviewing reports subsequently submitted by those participants.

Brown stated that his recommendation was not based upon Petitioner's ideology or membership in any organization (797). In fact, Brown did not even know what Petitioner's ideology was or what organizations he belonged to (797). Brown never spoke to Commissioner Cosgrove about Petitioner. Brown was not ordered to concoct a scheme to railroad Petitioner out of the SCPD (797). Brown had no reason to believe that his subordinates, the FTOs, the field training coordinators or Captain Rhoads fabricated a scheme to railroad Petitioner out of the SCPD for exercising his constitutional rights (797). Lt. Murphy (597-598); P.O. Friedrich (627-628); P.O. Hodge (652-653); P.O. Gormley (672-674); Sgt. Brady (708-710) and P.O. Ferrante (763-764) all testified in similar fashion. They also refuted Petitioner's allegations and explained their actions.

Brown's recommendation was passed up the chain of command to his superior, Chief of Patrol Edwin Michel (896). Michel passed it to his superior, Chief of Department Joseph Monteith (896). Monteith passed it to his superior, Commissioner Cosgrove. Cosgrove then directed that a termination letter be prepared (895; 900).

Petitioner called Commissioner Cosgrove to testify on his case in chief. Under questioning by Petitioner's counsel, Cosgrove explained that in cases of termination, he receives a package of documents which he examines to see if there was a general consensus that he take action. In Petitioner's case, Cosgrove remembered that he read many of the daily observation reports on Petitioner's field training (418-419). Cosgrove acknowledged (404-406) having seen memos from Monteith, Michel and Rhoads (895-899) before he gave the command to terminate Petitioner (408). Cosgrove also discussed Petitioner's termination with Deputy Police Commissioner Robert Kearon, who served as Cosgrove's legal adviser. Kearon told Cosgrove that "he saw no problem with it" (410). Cosgrove said that he never spoke with anybody that trained Petitioner, and never

spoke with any sergeants or lieutenants (410). Petitioner's counsel asked Cosgrove if he ever heard that Petitioner made allegations that there was discriminatory conduct going on within the Police Department (414). Cosgrove responded, "No" (414). Cosgrove remembered that there were a lot of daily observation reports in the package he was given with the recommendations from his commanding officers to terminate Petitioner (418). Cosgrove believed that the package might have included other memos and Petitioner's police academy record (418). Cosgrove also testified that he did not recall if Petitioner's personal statement was included (418).

Petitioner called Captain (formerly Lieutenant) William Murphy to the stand. Murphy stated that he did not have a belief as to Petitioner's political affiliations (572). Murphy believed that at times Petitioner made others feel that he was liberal in his viewpoints (573). Murphy told Petitioner that he had a school teacher mentality (573) and that it was a possibility, "communication wise", that Petitioner started off on the wrong foot with other police officers (574-575). Murphy asked Captain Rhoads to meet with Petitioner because Murphy could not describe Petitioner on paper (575-576). Murphy testified that Petitioner never complained to him about his field training officers using bad adjectives when speaking about minorities, or about targeting minority motorists and making illegal car stops until after Petitioner was terminated (576-577).

At the end of Phase VI, Petitioner told Murphy that he had not been shown the daily observation reports (578). Murphy then let Petitioner make copies of the reports (579). Murphy attended Chief Brown's meeting on January 24, 1994 (580-585). According to Murphy, "Chief Brown had called that meeting to get facts and answers to questions that he had regarding Mr. Wimmer's employment so that he would be able to make a recommendation to the commissioner as to whether to terminate or to retain Mr. Wimmer" (581).

On cross-examination, Murphy testified (595-596) that at the end of Phase VI he received from Petitioner a "Field Training Program Critique" (1138) and a "Recruit Field Training Guide" (1140-1148). In his written critique of the field training program, Petitioner did not mention anything about discrimination taking place (597; 1138). Similarly, Petitioner did not mention anything about being singled out or retaliated against (597; 1138). There was room on the form for those comments, or Petitioner could have written an internal correspondence to document those allegations (610). Murphy recommended that Petitioner be terminated based on his review of the daily observation reports and end of phase reports from all six phases, and his review of internal correspondence written by or about Petitioner and his discussions with Petitioner (599). Murphy stated that:

> [i]t became clear to me that Mr. Wimmer was not able to learn from his field training officers that a constant barrier to effective communication between the two was always present. He proved over and over that he just did not get a grasp of what the training process was all about.

(599-600).

On cross-examination, Petitioner testified that he enjoyed working for the NYPD and HAPD and thought that, "for the most part", they were professional (172). Later on cross-examination, Petitioner acknowledged that he had described the NYPD as "an unprofessional police agency" in internal correspondence he wrote while at the SCPD Academy (217-218; 850).

Discussing his claim for damages, Petitioner testified that some of the medical symptoms of the trauma he suffered as a result of being fired happened immediately after he was fired [February 15, 1994] (338). Headaches, throwing up and not

being able to eat started almost immediately, within a week of being fired (338). Loss of interest in outside activities started gradually, approximately two weeks after (338-339). Depression began within a week or so (339). Stomach problems, sleeping problems, impotency and anxiety and fear began within a week of his termination (339-340). Petitioner was then confronted with another document that he withheld from the defense until it was obtained from the NYPD on the eve of trial. The document was a medical questionnaire that Petitioner filled out and submitted to the NYPD on March 9, 1994 when he applied for reinstatement to the NYPD (1130). Petitioner stated, "I have nothing to report since my last full medical on August 25, 1992" (1130). Petitioner did not report any of his alleged trauma and medical conditions to the NYPD even though the medical questionnaire required him to respond truthfully and completely in order to be reinstated as a member of the NYPD (341-342).

PERCEIVED MISSTATEMENTS MADE IN THE PETITION

Petitioner alleges in his Petition for a Writ of Certiorari (hereinafter referred to as "the Petition") at page 2 that "[t]here was considerable evidence that a large number of officers had conspired to bring about petitioner's dismissal because they objected to his opposition to discrimination", and that the so-called conspirators "had hidden their motives from the Police Commissioner . . .". Those conclusory allegations are unsupported by the record. Indeed, the petitioner's complaint did not even allege the existence of any such conspiracy or attempt to state a claim based upon a conspiracy. Moreover, the petitioner did not raise and the courts below did not consider any conspiracy theory. *See Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212-213, 118 S. Ct. 1952, 1956, 141 L. Ed. 2d 215, __ (1998); *Equal Employment Opportunity Commission v. Federal Labor Relations Authority*, 476 U.S. 19, 24, 106 S. Ct. 1678, 1681, 90 L. Ed. 2d 19, __ (1986).

The Petitioner also purports to set forth the geographic jurisdiction of the SCPD and the racial demographics of Long Island. *See* Petition at page 3. There is no evidence of record on the racial composition of Long Island. In addition, the SCPD only has jurisdiction over parts of the five towns in the western part of Suffolk County, and it has no jurisdiction over the five towns in the eastern portion of the County.

Petitioner claims that "[r]acial issues arose throughout petitioner's training period." *See* Petition at page 4. This is an embellishment of the record. According to Petitioner's trial testimony, he heard the word "moulee" used one time while he rode with P.O. Pitts during Phase I (86-87). Petitioner never testified that he complained to anyone about the use of that word. Petitioner also testified that P.O. Hodge issued traffic tickets to Hispanic motorists without any cause on two occasions during Phase II (94-96; 99-100). According to Petitioner, he heard the word "niggers" used over the police radio one time during Phase II of field training (111). Petitioner did not tell any superior officers about the use of discriminatory language until he allegedly told Lt. Williams when he got to the Sixth Precinct for Phases III-VI (113). The record shows that Petitioner received critical narrative evaluations from P.O.'s Hodge, Ryan and Gormley before he arrived at the Sixth Precinct (972-973; 976-977; 988-991). Petitioner testified that he heard the work "spook" used two times during Phase III. Petitioner did not testify that he heard or observed any other racial slurs or incidents during Phases IV, V and VI. Petitioner acknowledged on cross-examination that he never documented any of those incidents (284-285; 293-295). Petitioner also acknowledged on cross-examination that none of the alleged racial incidents he observed, and none of the racial epithets he allegedly heard, was ever directed towards him or any members of the SCPD (323-324).

Petitioner's assertion that the alleged remark to him that demanded "whose side am I on anyway" had something to do

with assistance that he provided to an African-America family is unfounded in the text of the referenced transcript page (*See* February 4, 1997 at pp. 49-50).

On oral argument before the district court on the Respondents' Rule 50 motion, where the facts must be viewed in the light most favorable to the Petitioner, Respondents' counsel briefly described Police Officers Ferrante and Nolan as "the bad F.T.O.'s" based solely upon the Petitioner's testimony. Now, the Petitioner is unfairly trying to turn that description into some kind of an admission through the use of the phrase "candidly characterized." *See* Petition at p. 5.

Petitioner also mischaracterizes the record and the decision by the Second Circuit when he states that "Instead, the Commissioner asked his legal advisor whether there was a 'problem with the pattern' of concerted, apparently pretextual negative evaluations and whether as a result termination 'would present any legal problems'." *See* Petition at p. 7. The text that appears between the two quoted fragments of Commissioner Cosgrove's testimony has been fabricated by the Petitioner and has no basis in the record.

Petitioner also resorts to the use of scandalous and inflammatory statements that have no basis in the record. The entire statement at page 22 of the Petition, beginning with the remarks about the SCPD's "long, troubled history" and ending with the remarks about "a preemptive strike", are outrageous remarks that are not supported by any evidence in the record. Petitioner also falsely asserts that "[t]here was substantial evidence of widespread animus within the Suffolk County Police towards officers who opposed discrimination or reported misconduct, the all too common 'blue wall of silence . . .'." *See* Petition at p. 26. The record is completely devoid of any evidence to support that claim and the unwarranted *ad hominem* attack contained therein. Moreover, this assertion was not raised by the Petitioner in the courts below.

Perceived misstatements of law in the Petition will be addressed in the Reasons for Denying the Writ section of this Brief in Opposition.

REASONS FOR DENYING THE WRIT

THE PETITIONER HAS FAILED TO ESTABLISH JURISDICTION FOR REVIEW OF THE ORDER APPEALED FROM AS REQUIRED BY RULE 10 OF THIS COURT

A. The Courts Below Correctly Applied The Good Faith, Reasonable Belief Inquiry To The Petitioner's Opposition Clause Claim Under Section 704(a) Of Title VII.

The Petitioner was the beneficiary of a broad interpretation of the "opposition clause" of Section 704(a) of Title VII. 42 U.S.C. § 2000e-3(a). Under that broad interpretation, to prove that he engaged in protected activity, an employee need not establish that the conduct he opposed was in fact a violation of Title VII. The employee must, however, demonstrate that he had a good faith, reasonable belief that the underlying challenged actions of the employer violated Title VII. *Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1177-1179 (2d Cir. 1996); *Manoharan v. Columbia University College of Physicians & Surgeons*, 842 F.2d 590, 593 (2d Cir. 1988). In Petitioner's briefs to the Second Circuit, he cited to many of the cases that are also cited in his Petition and he variously described this rule as a "well established principle" (*see* Petitioner's main brief at p. 22) and as "the well settled principles of law which govern in this Circuit, and the majority of other Circuits" (*see* Petitioner's reply brief at p. 2). Petitioner has now abandoned the arguments that he advanced in the courts below and he has decided instead to characterize the prevailing case law as "sharply divided" and as "a trap for the unwary" that is replete with "loopholes". *See* Petition at pp. 8-9.

Petitioner should not be permitted to now attack for the first time in this Court the very same caselaw that he embraced in the courts below. *See Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212-213, 118 S.Ct. 1952, 1956, 141 L. Ed. 2d 215, __ (1998); *Equal Employment Opportunity Commission v. Federal Labor Relations Authority*, 476 U.S. 19, 24, 106 S. Ct. 1678, 1681, 90 L. Ed. 2d 19, __ (1986). The Petitioner's reversal of position, combined with what can be fairly described as a meandering legal argument that is characterized by a misapprehension of the cited caselaw, is an attempt to mask the fact that the Petitioner's real disagreement is with the conclusion by the courts below that no reasonable juror could have concluded that the Petitioner had a good faith, reasonable belief that the conduct he complained about constituted an unlawful employment practice of the SCPD. The courts below, however, correctly applied the prevailing jurisprudence on Title VII "opposition clause" retaliation claims and properly rebuked the Petitioner's attempt to turn that clause into a general bad acts statute. *See Crowley v. Prince George's County*, 890 F.2d 683, 685-687 (4th Cir. 1989), and *Silver v. KCA, Inc.*, 586 F.2d 138, 141 (9th Cir. 1978). Even though both *Crowley* and *Silver*, *supra*, were relied on by the Second Circuit in its decision in this case, the Petitioner has neither cited nor discussed those decisions in his Petition.

This is not a case involving a "real and embarrassing conflict of opinion and authority between Circuit Courts of Appeal." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79, 75 S. Ct. 614, 620, 99 L. Ed. 2d 897, __ (1955), *quoting Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S. Ct. 422, 423, 67 L. Ed. 2d 717 (1923) (considering the meaning of the phrase "special and important reasons" within the context of the former version of Rule 10 of the Supreme Court Rules). The Circuit Courts of Appeal have not had any difficulty applying the good faith, reasonable belief inquiry to section 704(a) "opposition clause" retaliation claims. *E.g.*, *Little v. United Technologies, Carrier Transicold Division*, 103 F.3d

956, 959-960 (11th Cir. 1997); *Jennings v. Tinley Park Community Consolidated School District No. 146*, 796 F.2d 962, 966-967 (7th Cir.), *cert. denied*, 481 U.S. 1017, 107 S. Ct. 1895, 95 L. Ed. 2d 502 (1987); *Love v. RE/MAX of America*, Inc., 738 F.2d 383, 385 (10th Cir. 1984); *Sisco v. J.S. Alberici Construction Company*, 655 F.2d 146, 150 (8th Cir.), *cert denied*, 455 U.S. 976, 102 S. Ct. 1485, 71 L. Ed. 2d 688 (1982); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1138 (5th Cir.), *cert. denied*, 455 U.S. 1000, 102 S. Ct. 1630, 71 L. Ed. 2d 866 (1982). Contrary to the Petitioner's contention, the lower courts are not sharply divided over the scope of the protection afforded by section 704(a). None of the cases cited by the Petitioner, including *Hedgepeth v. Kaiser Foundation Health Plan of the Northwest*, 76 F.3d 386, 1996 WL 29252 (9th Cir. 1996) (decision without reported opinion) and *Parker v. Baltimore and Ohio Railroad Company*, 652 F.2d 1012 (D.C. Cir. 1981), support that proposition.

The Petitioner struggles to articulate a ground for granting the petition notwithstanding the settled state of the applicable case law. His arguments are not persuasive and should be rejected.

The good faith, reasonable belief inquiry that was applied by the Second Circuit in this case under section 704(a) is consistent with Title VII's central purpose, which is the elimination of employment discrimination by informal means. *Little v. United Technologies, Carrier Transicold Division*, *supra*, 103 F.3d at 960 (11th Cir. 1997); *Payne v. McLemore's Wholesale & Retail Store*, *supra*, 654 F.2d at 1137-1138 (5th Cir.), *cert. denied*, 455 U.S. 1000, 102 S. Ct. 1630, 71 L. Ed. 2d 866 (1982); *Berg v. LaCrosse Cooler Company*, 612 F.2d 1041, 1045-1046 (7th Cir. 1980). The Petitioner's contention that Title VII is jeopardized by a decision that is consistent with the prevailing case law is illogical. The Petitioner prefers a rule that would dilute the good faith, reasonable belief inquiry to the point where it would become "no more than speculation

regarding [an employee's] subjective knowledge." *Harper v. Blockbuster Entertainment Corporation*, 139 F.3d 1385, 1388 n.2 (11th Cir. 1998). The Circuit Courts, however, have refused to eviscerate the reasonableness inquiry because to do so would encourage employees to immunize themselves from discharge or discipline by filing utterly baseless charges of discrimination. *Holland v. Jefferson National Life Insurance Company*, 883 F.2d 1307, 1315-1316 (7th Cir. 1989); *Booker v. Brown & Williamson Tobacco, Inc.*, 879 F.2d 1304, 1312-1314 (6th Cir. 1989); *Parker v. The Baltimore and Ohio Railroad Company*, 652 F.2d 1012, 1020 (D.C. Cir. 1981) ("The employer is sufficiently protected against malicious accusations and frivolous claims by a requirement that an employee seeking the protection of the opposition clause demonstrate a good faith, reasonable belief that the challenged practice violates Title VII.").

The Petitioner's argument that the Courts of Appeals have "fashioned three related loopholes", which the Petitioner alternatively describes as employer defenses (*see* Petition at pp. 8-9), is erroneous.

An employee seeking the protection of the "opposition clause" bears the burden of demonstrating a good faith, reasonable belief that the challenged practice violates Title VII; an employer does not have any burden to raise a defense or a "loophole" to an otherwise baseless opposition clause claim. *Little v. United Technologies, Carrier Transicold Division*, *supra*, 103 F.3d at 960 (11th Cir. 1997); *Parker v. The Baltimore & Ohio Railroad Company*, *supra*, 652 F.2d at 1020 (D.C. Cir. 1981). The courts below correctly found that the Petitioner failed to produce any evidence from which a reasonable juror could conclude that he held a good faith, reasonable belief that the challenged practices violated Title VII. *See Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318, 1328 (11th Cir. 1998). Indeed, the Petitioner did not offer any evidence at all that he subjectively believed that the SCPD was engaged in any unlawful employment practices and that his belief was objectively

reasonable. The only evidence of record on the pertinent good faith, reasonable belief inquiry consists of the Petitioner's admissions, which were brought out during his cross-examination by the Respondents, that none of the objectionable conduct was directed towards him or towards other employees of the SCPD. The Petitioner attempted to compensate for this glaring lack of evidence in the courts below by misconstruing certain caselaw. The Petitioner has repeated this tactic in his Petition by setting forth an argument that misapprehends the courts' holdings in *Rogers v. E.E.O.C.*, 454 F.2d 234 (5th Cir. 1971) and in *Moyo v. Gomez*, 40 F.3d 982 (9th Cir.), *amending*, 32 F.3d 1382, *cert. denied*, 513 U.S. 1081, 115 S. Ct. 732, 130 L. Ed. 2d 635 (1995), and by misquoting a portion of this Court's decision in *Meritor Savings Bank v. Vinson*, 447 U.S. 57, 66, 106 S. Ct. 2399, 2405, 91 L. Ed. 2d 49, __ (1971). *See* Petition at p. 10.

The case of *Rogers v. E.E.O.C.*, *supra*, came to the Fifth Circuit "in a preliminary and undefinitive posture." 454 F.2d at 236. The employer asked the district court "to limit at the threshold the investigative scope of the [E.E.O.C.] on the ground that the Commission seeks evidence of a discriminatory employment practice which is not proscribed by Title VII . . .". *Id.* The employee's indefinite charge of discrimination appeared to assert a claim based in part on the employer's alleged discriminatory treatment of patients. The Fifth Circuit refused to prohibit the E.E.O.C. from investigating certain patient records that were pertinent to that allegation. The court did not hold that discriminatory conduct directed towards non-employees is actionable as the basis of an "opposition clause" claim by an employee who witnessed and opposed that conduct. Rather, the court held:

> that an employer's patient discrimination may constitute a subtle scheme designed to create a working environment imbued with discrimination and directed ultimately at minority group employees.

> As patently discriminatory practices become outlawed, those employers bent on pursuing a general policy declared illegal by Congressional mandate will undoubtedly devise more sophisticated methods to perpetuate discrimination among employees.

454 F.2d at 239. The court allowed the E.E.O.C. to investigate whether or not the employer's treatment of patients was evidence of a "subtle" or "sophisticated" method of discriminating against its employees. 454 F.2d at 240-241. Clearly, the Petitioner has misapprehended the Fifth Circuit's holding in *Rogers v. E.E.O.C.* This error is compounded by the fact that the Petitioner has misquoted *Meritor Savings Bank v. Vinson*, *supra*, 477 U.S. at 66, 106 S. Ct. at 2405, 91 L. Ed. 2d at __, by deleting the words "for employees" from the quoted text, which should read: "that her employer created an offensive work environment **for employees** by giving discriminatory service to its Hispanic clientele." The Petitioner's errors improperly diminish the fact that even conduct directed towards non-employees must be connected in some way to an unlawful employment practice, be it overt, subtle or sophisticated, that victimizes employees.

The Petitioner's reliance on *Moyo v. Gomez*, 40 F.3d 982 (9th Cir.), *amending*, 32 F.3d 1382, *cert. denied*, 513 U.S. 1081, 115 S. Ct. 732, 130 L. Ed. 2d 635 (1995) is also misplaced. In that case, the Ninth Circuit reinstated the dismissed complaint and held, in pertinent part, that the plaintiff corrections officer could have had a reasonable belief that the prison inmates who were allegedly being mistreated qualified as employees protected by Title VII because, in certain circumstances, prison inmates can be considered as "employees" who are protected by Title VII. 40 F.3d at 985. Once again, and in accordance with settled Title VII "opposition clause" jurisprudence, the ultimate inquiry is always on whether or not the employee reasonably believed that the unlawful practice was an unlawful employment practice under Title VII.

Based on the foregoing discussion, the Second Circuit correctly held that "[b]ecause [Petitioner] did not introduce evidence that minority employees of the Department felt that they worked in a racially hostile environment, [Petitioner] could not reasonably have believed that he was protesting an unlawful hostile work environment." *See* Appendix at p. 17a.

The Petitioner also erroneously claims that the Circuit Court decisions utilize a "retrospective methodology" which improperly limits "opposition clause" claims by the application of caselaw decided after the conduct that was complained of. *See* Petition at p. 11. This argument is unfounded. For example, in *Lanaux v. Central New York Psychiatric Center*, 152 F.3d 919 (2d Cir. 1998) (decision without reported opinion), *cert. denied*, __ U.S. __, 119 S. Ct. 382, 142 L. Ed. 2d 316 (1998), the court simply held that the employee's complaints "about the treatment of minority patients were unrelated to any unlawful employment practice, and therefor the making of such statements was not protected activity." That holding was correct, it did not break any new ground, and it certainly did not apply a change in the law "retrospectively" to defeat the employee's claim that she had a good faith, reasonable belief that the practice was an unlawful employment practice at the time she opposed it. In *Manoharan v. Columbia University College of Physicians and Surgeons*, *supra*, 842 F.2d at 594 (2d Cir. 1988) and in *Mayo v. Kiwest Corp.*, 94 F.3d 642 (4th Cir. 1996) (decision without reported opinion), each of the Circuit Courts expressly reviewed the issue of the employees' objectively reasonable beliefs based on the state of the law at the time the employees engaged in the alleged protected activities. There is no division among the Circuit Courts on this approach, and the caselaw shows that the employee is always given the benefit of every doubt on the question of the objective reasonableness of his belief at the time of the conduct complained of, and is not prejudiced by later changes in caselaw. The Petitioner cites to *Harper v. Blockbuster Entertainment Corporation*, 139 F.3d 1385 (11th Cir. 1998) in an effort to further illustrate what he

characterizes as "the limitations of the protection afforded to complainants by this rule . . .". *See* Petition at p. 14. Presumably, the Petitioner's reference to "this rule" is intended to be a reference to the "retrospective methodology" rule that he has concocted. *Harper*, however, does not support the Petitioner's contention. The Petitioner has also mischaracterized the court's decision by stating that "the Eleventh Circuit stressed that at the time of that objection several circuits had agreed that such grooming standards were legal under Title VII" (*see* Petition at p. 14). The clear implication from this statement is that some circuits had a contrary view of the law. The court's decision, however, was not equivocal: "Every circuit to have considered the issue [on grooming standards] has reached the same conclusion reached by this Court . . .". 139 F.3d at 1388.

The Petitioner's remaining arguments on the "opposition clause" issue suffer from the same infirmities discussed above. Those arguments are equally without merit, and they fail to set forth any basis for granting the Petition.

B. This Court's Decisions In *Monell v. New York City Department Of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), And In Its Progeny, Should Not Be Overruled.

The Petitioner's request that the Petition be granted for the purpose of overturning or clarifying *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), and its progeny, should be denied. In his brief to the Second Circuit, the Petitioner argued that he established municipal liability under *Monell* and its progeny, including *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988). *See* Petitioner's main brief at pp. 27-40, and Petitioner's reply brief at pp. 7-11. Because the Petitioner embraced *Monell* and its progeny in the courts below, he cannot now argue in support of his Petition that certiorari should be granted to overrule those cases. *See Pennsylvania*

Department of Corrections v. Yeskey, supra, 424 U.S. at 212-213, 118 S. Ct. at 1956, 141 L. Ed. 2d at __; *Equal Employment Opportunity Commission v. Federal Labor Relations Authority, supra*, 476 U.S. at 24, 106 S. Ct. at 1681, 90 L. Ed. 2d at __ (1986). In addition, there is no basis in the record in this case that warrants undertaking a task as monumental as redefining the jurisprudence of municipal liability under 42 U.S.C. § 1983 and adopting the rule of *respondeat superior* liability for § 1983 claims. *See Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997).

CONCLUSION

For all the reasons set forth above, it is respectfully requested that the Petition for a Writ of Certiorari from the Order of the United States Court of Appeals for the Second Circuit, dated May 5, 1999, be denied in its entirety.

Respectfully submitted,

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